



No.68/2015

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.75 OF 2008

MUTUKU NGEI PLAINTIFF/RESPONDENT

VERSUS

MRS MULWA MATU

Suing as the legal representative of and on

Behalf of the estate of MWATU MUTUNE alias

MWATU WAITA NGUYO – DECEASED 1ST DEFENDANT

MUTYANGO MUSAU 2ND DEFENDANT

RULING

1. The Applicant's motion dated 22.5.2012 seeks orders for dismissal of suit for want of prosecution plus costs. The motion is supported by the grounds on the face of the Application and affidavit sworn by Mutyango Musau on 22.5.2005, and further affidavit sworn by the same person sworn on 9.10.2012. The application is opposed by the Replying Affidavit of Mutuku Ngei sworn on 14.9.2012.
2. The Applicant's claim was filed on 4.7.08 and Defence was filed on 26.8.08. The pleadings were closed on 26.8.08 and thereafter up to 22.5.2012 (4 years) no action was taken until the instant application was filed. The Applicant avers that the Plaintiff/Respondent does not show cause why he did not set down for hearing for about 4 years. Thus, orders for dismissal are sought as this delay offends the provisions of Order 17 (2) (1), (3) Civil Procedure Rules 2010.
3. The Respondent denies and avers that the court record bears him witness that the matter had been in court on various dates. The Respondent states that on 15.3.2011 the matter was in court for mention. The Respondent also avers that invitation to fix hearing date was filed in court on 16.6.2012 and served upon applicant advocate on 30.5.2012 and hearing date was fixed on 20.9.012. The Respondent avers that the matter being land dispute court should endeavor to hear suit on merit rather than determine same summarily.
4. The Respondent relies on case of **MWAMBIA VS. KABANSORA CO. LTD. & ANOTHER eKLR (2014)** where the court held that:

“both Plaintiff and Defendant are to blame for delay in this matter as they have not on

their part complied with order 3 rule 2 Civil Procedure Rules. I find that this suit is not even ready for hearing and as such both parties are to blame for delay”.

The court thus dismissed the application.

5. The Plaintiff/Respondent avers that he has partly complied with Rule 1 of Order 11 Civil Procedure Rules 2010 though Defendant has not. The Respondent also allude to the fact that there was no ELC court in Machakos and thus land matters were not being fixed for hearing for quite some time. He thus seeks the court to dismiss the application with costs. After perusing the application, material before court and parties submissions, I make the following findings:

- The instant suit was lodged on 13.6.08 over Muputi/Kiima kimwe/701.
- The 2nd Defendant/Applicant filed defence on 4.6.08.
- The 1st Defendant filed her defence on 11.8.08. On 25.11.09 a date for hearing was fixed on 15.12.2010.
- On 11.5.2011 a date was fixed for hearing on 22.11.2011.
- On 22.11.2011 the court fixed mention date on 15.3.2012 to confirm compliance.
- On 15.3.2012 court directed that orders of 22.11.2011 be complied with and suit be fixed in the registry.
- On the same 22.5.2012 the application for dismissal for want of prosecution was filed.

The aforesaid narrative, completely contradicts the applicant's narration that the suit had taken 4 years without any action being taken. The invocation of the provisions of order 17 Civil Procedure Rules 2010 is thus unjustified and the application is premature.

In any event, the Plaintiff/Respondent has filed lists of documents on 14.9.2012 and list of witnesses but the Applicant has not complied. The provisions of order 17 impose duty of taking action to both sides not only the Plaintiff. The court therefore finds no merit in the application and makes the following orders:

1. The Application is dismissed.
2. Costs in the main cause.
3. Parties to comply within 30 days and fix hearing date.

Dated and Delivered at Machakos, this 13th day of February, 2015.

CHARLES KARIUKI

JUDGE